Pacific Dry Dock & Repair Company, a division of Crowley Maritime Corporation *and* Pacific Coast Metal Trades District Council *and* Robert Reading, Petitioner. Cases 32–CA–10161 and 32–RD–877

June 27, 1991

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 30, 1989, Administrative Law Judge Richard J. Boyce issued the attached decision and report on objections and challenged ballots. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent, Pacific Dry Dock & Repair Company (PDD), a division of Crowley Maritime Corporation, operates two shipyards in Oakland, California. On December 1, 1988, a decertification election was held at the Respondent's two shipyard facilities to determine whether the bargaining unit employees, consisting of the hourly paid production, repair, and maintenance employees at the two shipyards, desired to have the Pacific Coast Metal Trades District Council (District Council) continue to represent them. The tally of ballots showed 13 for, and 13 against the Union, with 12 challenged ballots, a number sufficient to affect the outcome of the election.

The judge found that during the course of the decertification election the Respondent violated Section 8(a)(1) of the Act by demanding that Everardo Aguiar leave its premises and by threatening him with arrest if he failed to do so. The judge also found that the Respondent's actions in this regard constituted objectionable conduct sufficient to warrant setting aside the election. For the reasons set forth below, we reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by demanding that Aguiar leave the facility and by threatening Aguiar with arrest. We also find, contrary to the judge, that the Respondent's actions in this regard did not constitute objectionable conduct and that the election should not be set aside. Finally, we shall order that the case be remanded to the Regional Director for Region 32 with the direction to open and count those ballots with regard to which the challenges have been overruled,[1] and to take further action as set forth below.

The facts concerning the alleged 8(a)(1) violation are as follows. The decertification election was scheduled to take place between 3:30 and 4:30 p.m. on December 1, 1988, at the Respondent's yard 2 facility. The preelection conference was held at 2:30 p.m. and was attended by the Board agent, representatives from the eight unions involved in the election, and representatives of the Respondent. During the course of the meeting, the Board agent learned that the District Council planned to use Aguiar, a former employee of the Respondent, as an election observer.[2] The Board agent informed the District Council's representatives that this would be contrary to the Board's rules and that the District Council would have to find another observer. Consequently, the District Council decided to use a current employee as an observer in place of Aguiar.

Unaware that he would not be able to act as an observer, Aguiar arrived at the Respondent's facility at approximately 3:30 p.m. He was met by Mark Van Zevern, a business representative for Painters Local 1176, who was emerging from the preelection conference. Van Zevern informed Aguiar that he could not act as an observer for the District Council. Nevertheless, Aguiar obtained a pass from the gate guard and accompanied Van Zevern into the yard where they joined a group of union representatives. At this time John Dunn, PDD's production manager, greeted Aguiar and the two men chatted amiably for several minutes. Van Zevern and Aguiar then moved to a telephone booth adjacent to the building where the election was being held and Van Zevern made two phone calls. Employees on their way to vote had to pass by the telephone booth, which was located approximately 25 feet from the foot of the stairway that employees had to use to reach the polling place, a second-story loft. After seeing Aguiar converse with an employee on his way to vote, Dunn joined Van Zevern and Aguiar near the phone booth. His professed purpose for doing so was to engage the men in conversation and thus prevent Aguiar from conversing with employees on their way to vote. As employees passed by, however, Aguiar continued to engage them in conversation while Dunn and Van Zevern talked.[3] His strategy having failed, Dunn decided to report the situation to the Respondent's general manager, Hartsock.

[1] In this regard, we adopt the judge's recommendations as to the disposition of the challenged ballots except with regard to that of Drydock Foreman Lee, who, for reasons explained below, we find is not a supervisor under the Act.

[2] During his employment with the Respondent until March 1987, Aguiar had been active in the Union and had served as a union steward. At the time of the election, Aguiar was employed full time by another employer and also worked for the Union on occasion without pay. Aguiar had no official status in the Union.

[3] Aguiar conversed with these employees in Spanish. Dunn does not speak Spanish.

After receiving Dunn's call, Hartsock came down to the yard and met Aguiar and Van Zevern at approximately 3:45 p.m. The encounter between Hartsock and Van Zevern and Aguiar lasted between 2 and 6 minutes.[4] Hartsock told Aguiar to leave the yard. Van Zevern replied that Aguiar was a union representative and therefore entitled to stay. Hartsock disputed Aguiar's status as an official union representative and again insisted that Aguiar leave the yard. Hartsock was ''real polite'' at first, but became ''visibly upset'' as the encounter progressed and began ''yelling pretty loud.''[5] Finally, Hartsock said that he wanted the ''motherfucker [Aguiar]'' out of the yard and that he would have him arrested if he did not leave. When Van Zevern resisted, Hartsock said that he would have ''all of'' the District Council members arrested if Aguiar did not leave. At that point, Van Zevern relented and escorted Aguiar off the Respondent's premises.

The judge found that Aguiar, although not an employee of the Respondent, was an employee of another employer and thus came within the statutory definition of ''employee'' under Section 2(3) of the Act. The judge further found that by distributing handbills in the week before the election, showing up for the election to act as an observer, and by remaining in the yard for the election outcome, Aguiar was both ''aiding the District Council'' and ''advancing the cause of representation on behalf of PDD's employees.'' Therefore, the judge concluded that Aguiar was exercising his Section 7 rights to assist labor organizations and to engage in other protected concerted activity and that Hartsock's demands that Aguiar leave the yard and his threats to have Aguiar arrested or to call the police interfered with, restrained, and coerced Aguiar in the exercise of these rights. Finally, observing that Aguiar was not an employee of the Respondent, the judge weighed Aguiar's Section 7 right to be on the Respondent's premises against the Respondent's private property right. Finding that the Respondent's only reason for seeking Aguiar's removal was its belief that Aguiar did not have an official union status, and that the Respondent ''singled out'' Aguiar because he was a statutory employee engaged in protected activity, the judge concluded that Hartsock's demands and threats served no legitimate private property interest. Consequently, the judge concluded that the Respondent violated Section 8(a)(1). We disagree.

We find the judge's analysis flawed in two respects. First, the judge erred in analyzing Aguiar's right to have access to the Respondent's property in terms of Aguiar's Section 7 right as a ''statutory employee'' rather than by reference to the Respondent's employees' Section 7 right to have contact with union representatives in furtherance of their legitimate rights to organize and to exercise their freedom of choice in the election.[6] Second, in balancing the employees' Section 7 rights against the Respondent's property interest, the judge failed to apply the analysis set out in *Jean Country*, 291 NLRB 11 (1988), where the Board modified the analysis it would apply in ''access'' cases as set out previously in *Fairmont Hotel*, 282 NLRB 139 (1986).

In *Jean Country* the Board stated that ''in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted.'' In this regard, the Board emphasized that in balancing these rights, it would view ''the availability of reasonably effective alternative means as especially significant . . . .''[7] Clearly, the right asserted here, namely, the right to organize, is relatively strong.[8] Although the election in question was a decertification election, it obviously still involved, at least in part, the employees' right to self-organization. Similarly, the Respondent's property interest is a strong one. In this regard, there is no evidence that the Respondent allowed nonemployees onto its premises without permission. The record establishes that prior to the election union organizers did not have such permission.[9] Pursuant to an agreement reached by the parties at the preelection conference, the Respondent allowed union representatives to remain on the premises during the election. Moreover, after Van Zevern informed Aguiar that he could not act as an election observer, Aguiar had no official status that required his presence on the Respondent's property during the course of the election. The fact that Aguiar passed through the gate and

[4] The judge found it unnecessary to determine which version of this encounter was most credible as he found them ''functionally equivalent.'' For the purposes of this case, we rely on that version which appears to be most favorable to the General Counsel.

[5] Approximately 13 or 14 people walked by during the encounter, including 2 recognized as unit employees. Although these employees could observe that Hartsock was angry with Aguiar and Van Zevern, there is no evidence that these employees, or that anyone else passing by, heard Hartsock's threat or knew why he was angry. Indeed, the two employees later asked Van Zevern what he had done to make Hartsock angry.

[6] As the Supreme Court stated in *Sears, Roebuck & Co. v. San Diego County*, 436 U.S. 180, 206 at fn. 42 (1978):

> *Babcock* [351 U.S. 105 (1956)] makes clear that the interests being protected by according limited-access rights to nonemployee, union organizers are not those of the organizers but of the employees located on the employer's property. The Court indicated that ''no . . . obligation is owed nonemployee organizers''; any right they may have to solicit on an employer's property is a derivative of the right of that employer's employees to exercise their organization rights effectively.

Although Aguiar may indeed possess Sec. 7 rights on his own as a statutory employee of his own employer, his right to enter the Respondent's property, like that of the other union organizers (who may also be statutory employees of other employers, e.g., the Union), is derived from the Sec. 7 rights of the Respondent's employees and must be analyzed as such.

[7] *Jean Country*, supra at 14.

[8] See, e.g., *Lechmere, Inc.*, 295 NLRB 92 (1989), enfd. 914 F.2d 313 (1st Cir. 1990).

[9] We note that in the week prior to the election Aguiar distributed handbills at the Respondent's gate. No party contends that Aguiar had a right to be on the Respondent's property prior to the election date.

entered into the yard establishes at most that the Respondent granted permission to Aguiar to enter its property—permission which it later revoked.

With regard to the existence of reasonable effective alternatives to Aguiar's presence on the property, we emphasize that on the day of the election itself, the Respondent allowed official union representatives onto its property. These representatives remained in the yard throughout the election. We find that the General Counsel did not show that the presence of these representatives in the yard during the course of the election was not a sufficiently reasonable alternative to Aguiar's presence to protect the Respondent's employees' Section 7 rights to organize and to exercise freedom of choice in the election.[10] We therefore conclude that although the right asserted here is certainly worthy of protection from substantial impairment, the General Counsel has not established that such impairment would occur with Aguiar absent from the Respondent's property on the election day. Thus, we conclude that the Respondent was free to revoke its permission to Aguiar and that Hartsock, in fact, did so when he requested that Aguiar leave the facility. Therefore, we conclude that Hartsock's request that Aguiar leave the Respondent's premises was lawful and that his threat to have Aguiar arrested on Aguiar's refusal to do so was not a violation of the Act.[11]

We further find that the Respondent's employees' Section 7 rights were not chilled by Hartsock's display of anger toward Aguiar. In this regard, we emphasize that there is no evidence that any employee heard Hartsock threaten to call the police or to have Aguiar arrested if he did not leave the yard.[12] Passers-by could only observe that Hartsock was angry with Aguiar and Van Zevern. In view of the fact that Aguiar was not a union representative and that the employees could see the official union representatives awaiting the election results without incident, we find that the Respondent's employees could not reasonably conclude that they would be subject to the same anger if they voted for the Union. This is especially true in the present circumstances where we have found that Hartsock's display of anger was provoked by Aguiar's refusal to leave the facility and that Hartsock's threat to call the police was not unlawful. Thus, we conclude that the Respondent did not violate Section 8(a)(1) of the Act.

Finally, as we have found that the Respondent's employees' Section 7 rights to support the Union and to exercise freedom of choice in the election were not chilled in the circumstances here, we similarly conclude that Hartsock's display of anger and his threat to have Aguiar arrested did not constitute objectionable conduct sufficient to warrant setting aside the election.

As to the election itself, the judge recommended that the challenges to the ballots of seven voters be overruled and that the challenges to the ballots of five voters be sustained. As noted above, we adopt the judge's recommendations regarding the disposition of the challenged ballots except with regard to that of Drydock Foreman Lee.[13] Although noting that the record concerning Lee was ''not well developed,'' the judge found it ''difficult to imagine'' how Lee could discharge his responsibilities without the exercise of independent discretion in directing the work of others. Thus, the judge concluded that Lee was a supervisor and sustained the challenge to his ballot. The Respondent excepts to the judge's finding on the ground that

[10] As to Aguiar's Spanish-speaking ability, there is no contention that Aguiar did not have ample time and opportunity before the election to talk to employees or that other Spanish speakers were not available on election day if such was necessary or desirable.

[11] See *Hempstead Motor Hotel*, 270 NLRB 121 (1984), and *Crest Industries Corp*., 276 NLRB 490 (1985).

[12] *Hempstead Motor Hotel*, supra at 123. We find that Hartsock's threat to have all the District Council representatives arrested was not violative of Sec. 8(a)(1) for the same reason, i.e., there is no evidence that unit employees heard the threat.

[13] The ballots of Elbert Cobb, Alfonso Curiel, Atanasio Duenas, Abel Topete, and Stanley Wilcox were challenged on the ground that their names did not appear on the voter eligibility list. Baldwin, the Employer's manager of personnel and labor relations, testified that the names of these individuals had not been included on the eligibility list because they were not on the payroll on the cutoff date and did not have seniority status. Baldwin testified that the Respondent required employees to be on the payroll for 90 days within a 6-month period to realize seniority status and that employees without seniority status had no right of recall. Finding that these five employees were ''in essence'' on-call employees, and that the five met the Board's voter eligibility requirements for on-call employees, the judge recommended that the challenges to their ballots be overruled. The Respondent excepts, contending that the judge applied the incorrect eligibility formula. The Respondent asserts that because these employees were laid off and subject to recall, the judge should have applied the eligibility formula for employees on layoff, that is, whether they had a reasonable expectancy of recall in the near future. See *Atlas Metal Spinning Co*., 266 NLRB 180 (1983). In this regard, the Board requires that ''employees laid off prior to the payroll eligibility period must have had a reasonable expectation of recall as of the payroll eligibility period in order to be eligible to vote in the election, regardless of whether the employees have been recalled prior to the election.'' *Apex Paper Box Co*., 302 NLRB 67, 68 (1991). In determining whether a reasonable expectation of recall exists, the Board examines several objective factors, including ''the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.'' Id. at 68. Applying these criteria to the facts of the present case, we find that these five employees are eligible to vote. In this regard, we note that the five had worked with regularity during the quarter preceding the election, that the Respondent had not announced a change in its operation or an intention to discontinue its past practices, and that the Respondent had not informed the five employees that there would be less work in the future. Because it is unclear whether on-call employees would be included in the bargaining unit, we do not pass on the judge's finding regarding on-call status.

Members Cracraft and Devaney here apply the reasonable expectancy of recall test under the Board's majority view in *Apex* for institutional reasons, and find that the five employees are eligible to vote. They note, however, that because the five employees had been recalled prior to the election, they would find these employees in any event eligible under their respective dissents in *Apex*.

Finally, the Respondent excepts to the judge's finding that Foremen Hendrix, Marino, Moody, and Santiago were supervisors and to his recommendation that the challenges to their ballots be sustained. We agree with the judge that there is sufficient evidence to support a finding that these four men exercised supervisory authority and were supervisors under Sec. 2(11) of the Act. In this regard, we emphasize Hartsock's own testimony that if an employee had not ''proven'' himself, a foreman's recommendation to fire that employee ''would be very persuasive.''

the Union has the burden of establishing Lee's supervisory status and that the Union has failed to meet that burden. The Respondent argues that the judge's finding is based on conjecture and surmise rather than an analysis of the evidence. We agree. As the judge himself stated, there is little evidence in the record regarding Lee's status. In these circumstances, we agree with the Respondent that the District Council, as the party moving to exclude Lee from voting, has the burden of proving that Lee is a supervisor and that it has failed to present evidence sufficient to sustain that burden. Consequently, we find that Lee is not a supervisor, that the challenge to his ballot is overruled, and that his ballot should be opened and counted along with the seven challenged ballots regarding which the judge recommended overruling the challenges.

ORDER

The complaint is dismissed.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, pursuant to the National Labor Relations Board Rules and Regulations, within 10 days from the date of this decision, open and count the ballots of Elbert Cobb, Alfonso Curiel, Atanasio Duenas, Abel Topete, Stanley Wilcox, Walter Burke, Robert Reading, and Thurman Lee. The Regional Director shall further prepare and cause to be served on the parties a revised tally of ballots and thereafter issue the appropriate certification.

Donna Yamashiro, Esq. and *Virginia L. Jordan, Esq.*, for the General Counsel.
Christopher J. Martin, Esq., of San Jose, California, for the Respondent.
Vincent A. Harrington, Jr., Esq. and *Robert Hirsch, Esq.*, of San Francisco, California, for the Charging Party.
Robert Reading, pro se.

DECISION AND REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried in Oakland, California, on May 10 and June 12 and 13, 1989.

On December 1, 1988, in Case 32–RD–877, the Board conducted an election among the hourly paid production, repair, and maintenance employees at the two Oakland shipyards of Pacific Dry Dock & Repair Company (PDD), a division of Crowley Maritime Corporation (Crowley), to determine if they desired continued representation by Pacific Coast Metal Trades District Council (District Council). The tally was 13 for and 13 against, with 12 challenged ballots.

The election derived from a petition filed by Robert Reading, a PDD employee, on July 20, 1988; and a Stipulation for Certification on Consent Election approved by the Regional Director on November 10. The District Council filed postelection objections on December 8. On January 12, 1989, the Regional Director issued a report stating that one of the objections[1] and the 12 challenges raised ''material and substantial issues . . . which can best be resolved by a hearing.''

The charge in Case 32–CA–10161 was filed by the District Council on February 4, 1989. The complaint issued on March 21 and alleges that PDD violated Section 8(a)(1) of the National Labor Relations Act (the Act) as follows:[2]

> On or about December 1, 1988, [PDD] . . . acting through Robert Hartsock, in the presence of its employees, during the course of an NLRB-conducted decertification election, discriminatorily threatened to have a statutory employee/organizer of the Union arrested unless said employee left Respondent's premises because of his activities on behalf of the [District Council].

Coincident with the complaint's issuance, the Regional Director issued an order consolidating the two cases for hearing, noting that both involve the same alleged misconduct.

I. JURISDICTION AND LABOR ORGANIZATION

PDD conducts a ship-repair business in Oakland. The pleadings establish and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The pleadings also establish and I find that the District Council, comprised of some 10 craft unions, is a labor organization within Section 2(5) of the Act.

II. PPD'S ALLEGED MISCONDUCT

A. *Evidence*

The election, at PDD's yard 2,[3] ran from 3:30 to 4:30 p.m. A shift-change occurred at 4 p.m. The polling place was a second-floor loft, accessible by an outside stairway.

Everardo Aguiar had been a PDD painter for about 10 years until participating in a strike, sanctioned by the District Council, that began in March 1987.[4] He was the District Council's chief steward the last 5 or so years of his time with PDD; and, although no longer on the PDD payroll, he campaigned for the District Council in the week before the current election, distributing leaflets outside one of the gates on two occasions.

Aguiar, expecting to be one of the District Council's election observers, arrived at yard 2 about when voting began. He was met in the parking lot by Mark Van Zevern, a business representative for Painters Local 1176, who had just emerged from the preelection conference. Van Zevern told him that the Board agent conducting the conference had said

[1] The District Council previously withdrew its other objections.

[2] Sec. 8(a)(1) states that it is an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Sec. 7 states in relevant part that ''employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .''

[3] The two yards are less than a mile apart. PDD's employees work in them interchangeably.

[4] Aguiar declined a subsequent offer to return, and now works for another ship-repair firm. The parties stipulated that he remains an ''employee'' for purposes of the Act.

only PDD employees could be observers. Aguiar nevertheless accompanied Van Zevern into the yard, first obtaining a pass from the gate-guard, and the two joined a group of union representatives waiting outside near the plate shop until the ballots could be counted. While they were there, John Dunn, PPD's production manager, greeted Aguiar and the two chatted amiably for several minutes. Dunn testified that he did not question why Aguiar was there: that he ''just assumed that he was there because of the election.''

Aguiar and Van Zevern shortly proceeded to a telephone booth adjacent the building where the election was taking place, and Van Zevern made two calls. The booth was perhaps 25 feet from the foot of the stairway to the polling place; and, according to Dunn, the employees ''had to go by [it] to be able to go up the stairs to where the voting was taking place.'' Dunn shortly engaged Van Zevern and Aguiar in conversation at the booth. His professed purpose was that, having seen Aguiar speak to an employee enroute to vote, he ''went over there to try to make conversation . . . so that they wouldn't be talking with the other'' prospective voters. Dunn concededly did not ask Aguiar to avoid talking with employees, however, nor did he say anything to Van Zevern ''pertaining to the election.'' Dunn testified that his stratagem failed—that Aguiar ''would break off and talk with'' other employees passing by while he and Van Zevern ''would keep talking''; so he ''figured'' he should report the situation to Hartsock, PDD's general manager.[5]

Hartsock confronted Aguiar and Van Zevern, still at the telephone booth, at or about 3:45. The record is uncontroverted that he told Aguiar to leave the yard; that Van Zevern said Aguiar was a union representative and thus entitled to stay; that Hartsock disputed Aguiar's having official union status and persisted in his demand; and that, finally, after Crowley's manager of personnel and labor relations, Tom Baldwin, and a representative of the Machinists Union, Marvin Relso, were summoned to the scene, Van Zevern relented and escorted Aguiar to the gate.

The record is in conflict, however, concerning the precise form of Hartsock's demand. Van Zevern testified that Hartsock said he ''[wanted] the motherfucker out of [his] yard''; that he would have him ''arrested'' if he did not leave; and, to Van Zevern's resisting, that he would have ''all of'' the District Council representatives ''arrested,'' as well, if Aguiar did not leave. Similarly, Aguiar recounted that Hartsock first said he would have him ''arrested'' if he did not leave; then, faced with Van Zevern's continued obduracy, exclaimed, ''Get this motherfucker off of my property or I'm going to have you arrested.''

Michael Regan, business manager of Boilermakers Local 6, testified that he heard sounds of an altercation from about 20 feet away, and that, approaching ''to see what . . . was going on,'' he heard Hartsock tell Van Zevern to ''get this motherfucker out of this] shipyard,'' after which Hartsock told Kelso that Aguiar ''had to be removed'' or all the District Council representatives would be ''subject to arrest.''

Hartsock testified that he announced, after several times demanding that Aguiar leave, ''Look, he's either going to leave or I'm going to have to call the police and get them in here to escort him out of the yard.'' Dunn likewise averred that, after arguing to and fro with Van Zevern, Hartsock said to Aguiar, ''If you don't leave, I'll call the police and have you escorted out of the yard''; and Baldwin recalled Hartsock's ''indicating] that he would call the police and have [Aguiar] escorted off the premises.''

Hartsock denied ''threaten[ing] to have anybody arrested'' or calling Aguiar a ''motherfucker''; and Dunn and Baldwin both testified that they did not hear him use the words ''arrest'' or ''motherfucker.''

Hartsock testified that he stated, in support of his insistence that Aguiar leave, that he was not a union representative and that he had not attended the preelection conference ''where the agreement was made for only those people at that conference to remain in the yard.'' He elaborated, concerning this supposed agreement, that he had asked ''towards the end'' of the conference if PDD had ''to allow'' the District Council representatives to remain on the premises during the election; that the Board agent answered that it was ''up to'' PDD; and that he then proclaimed, ''Okay, it's fine if you guys that are here now remain on the premises.'' Hartsock further testified that he cited this ''agreement'' to Kelso, and that Kelso thereupon told Aguiar, ''You shouldn't be in the yard.''

Baldwin largely echoed Hartsock, testifying that the Board agent had said during the preelection conference that the union representatives were ''basically guests'' and PDD ''had the right to ask them to leave''; that Hartsock thereupon ''indicated'' that he was giving ''authorization to be in the yard'' to conference attendees; that Hartsock later ''indicated'' to Aguiar that he would have to leave because he was not among ''the individuals who had permission to remain in the yard''; and that Kelso, agreeing, injected that the union people were ''all guests'' and PDD ''could ask any one of us or all of us to leave.''

Dunn, who did not attend the preelection conference, testified, vaguely, that he ''believe[d]'' Hartsock said, in support of his demand, that Aguiar ''wasn't at the pre-election conference''; and that Kelso then remarked that Aguiar was ''a guest'' and ''probably'' should leave.

PDD's witnesses to the contrary, Van Zevern testified that Hartsock cited no reason for Aguiar's ouster; that, while the preelection conference dealt with where the union representatives were to wait out the election, their being on the premises was never an issue; that he could not recall the Board agent's characterizing them as ''guests''; and that Kelso, far from agreeing that Aguiar should leave, told Van Zevern: ''[I]t's your call. You make a decision and we'll back you up.''

Regan, roughly corroborating Van Zevern, testified that he could not recall any limitation on the number of union representatives on the premises, or the Board agent's terming them ''guests.'' Indeed, Regan testified, a proposal by the Petitioner, Reading, that the union officials leave during the election wag rejected. Regan mirrored Van Zevern, as well, that Relso said to Van Zevern, ''We're here to back you up, whatever you want to do.'' With that, according to Regan, Van Zevern stated, ''There's no reason for us all to go to jail,'' and walked Aguiar to the gate.

[5] Dunn, who does not understand Spanish, testified that he saw Aguiar speak individually, in Spanish, to four employees—two whom he named and ''a couple others''—as they ''were heading upstairs'' to vote. He added that, after greeting them cordially, Aguiar ''became very direct and pointed,'' causing Dunn to assume that he was ''giving directions'' how to vote. Aguiar, corroborated by Van Zevern, testified that he confined his remarks to simple greetings. Van Zevern admittedly knows ''very little'' Spanish, but does ''understand some words.''

The record contains no evidence that the Board agents conducting the election were notified of, or asked to intervene in, the dispute.

By various estimates, the encounter lasted between 2 and 6 minutes. Van Zevern testified that ''probably 13 or 14 people'' walked by while it progressed, two of whom he recognized as unit employees; that ''a number'' paused ''to see what was going on''; and that two unit employees spoke to him about it in the immediate aftermath.[6] Aguiar testified that he did not notice any workers nearby during the incident, but that two employees spoke to him about it soon afterward;[7] and Regan testified that ''a lot of both employees and Navy personnel [were] going by the area'' at the time.[8] Hartsock testified, on the other hand, that he ''didn't notice any'' unit employees in ''close proximity'' to the encounter; Dunn, that he ''didn't see any employees . . . within earshot''; and Baldwin, that he saw no employees passing by.[9]

Van Zevern testified that Hartsock became ''more visibly upset'' as the exchange progressed; that his voice ''escalated to the point he was yelling pretty loud.'' Aguiar recounted that Hartsock was ''real polite'' at first, but that he ''got upset'' and his voice changed from ''normal'' to a ''scream.'' Regan testified that Hartsock spoke ''loud enough'' to command his attention from about 20 feet away, and was ''visibly upset.''

Hartsock would have it, however, that he was ''firm'' with Aguiar, but ''didn't raise [his] voice''; Dunn, that Hartsock, although ''direct in what he was saying,'' did not raise his voice and ''wasn't angry''; and Baldwin, that Hartsock ''didn't seem to be agitated'' and ''wasn't shouting or hollering.''[10]

Kelso did not testify, and, as against Regan's considerable testimony about the encounter, Hartsock and Dunn testified that Regan was not in a position to observe.

Aguiar's union activities were as an unpaid volunteer. He testified that, as chief steward while on the PDD payroll, he raised informal complaints on behalf of employees about once a week, and initiated a formal grievance ''every three months or so.''[11] Hartsock admittedly received reports ''on occasion'' about these activities. Aguiar also testified that Hartsock and Dunn both spoke to him as he handbilled before the election, the implication being that they were aware of that activity. Hartsock denied that he saw Aguiar so engaged, and Dunn testified that he did not recall it.

The evidence is mixed whether Hartsock knew of the District Council's intent to use Aguiar as an election observer. Although conceding that the Board agent asked the parties during the preelection conference whom they wished to use, Hartsock denied that Aguiar's name came up. Baldwin echoed that denial. Regan testified, on the other hand, that Aguiar's serving was ''openly discussed'' during the conference. Van Zevern testified to like effect. Regan and Van Zevern acknowledged, however, that the Board agent told them, in a hallway aside, that Aguiar could not serve.

B. *Conclusions*

1. The 8(a)(1) violations

As stipulated by the parties, Aguiar, although not a PDD employee, is an ''employee'' for purposes of the Act.[12] By distributing prounion handbills the week before the election, by showing up for the election expecting to be an observer, and by remaining in the yard for the election outcome on learning that he could not so serve, he was at once aiding the District Council and advancing the cause of representation on behalf of PDD's employees. He therefore quite literally was within his Section 7 rights ''to . . . assist labor organizations'' and ''to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' That he was an employee of an employer other than PDD makes no difference.[13]

Hartsock's demands that Aguiar leave and his attendant threats to have him arrested or to call the police, depending on whose version is believed,[14] perforce interfered with, restrained, or coerced Aguiar in the exercise of those Section 7 rights.[15]

That, however, does not conclusively establish a violation of Section 8(a)(1). Rather, Aguiar not being an employee of PDD, his exercise of Section 7 rights on its premises must be weighed against its private property rights, ''with as little destruction of one as is consistent with the maintenance of the other.''[16] Hartsock's only reason for seeking Aguiar's

[6] Van Zevern identified the two employees as Charles Turner and Alfonso Curiel. He recounted that Turner ''approached'' him at or about 4:15 and, remarking that he had never seen Hartsock ''that upset,'' asked Van Zevern, ''What the hell did you do?'' Van Zevern assertedly answered, ''I have no idea what we did to piss him off, but . . . obviously we did.'' Van Zevern continued that Curiel exclaimed to him, a minute or two later, ''Goddamn, you pissed Hartsock off, didn't you?'' Turner, called by PDD, testified that he conversed with Van Zevern ''after the election,'' but could not remember what was said. He averred that he did not see Hartsock at all that day, let alone in the subject encounter. Curiel did not testify.

[7] Aguiar testified that Francisco Molina said to him in Spanish, as Aguiar was leaving the premises, ''They throw you out''; and that he responded, ''Yes, they threw me out.'' Aguiar recalled that Molina was laughing. Molina did not testify. Aguiar also testified that Charles Turner asked him, in the parking lot, ''What are you doing over here?''; that he replied, ''They kicked me out''; that Turner asked why; and that he said, ''Because they didn't believe I was a representative of the union.'' Turner ''just laughed,'' according to Aguiar. Turner largely corroborated Aguiar, testifying that Aguiar told him Hartsock had ''threatened to call the police . . . if he didn't leave'' the yard and that he then left because ''it wasn't worth going to jail.''

[8] Regan enlarged that ''about 40 or 50 people worked in the area,'' plus ''probably an additional 40 Navy people.'' He added that ''it was hard to differentiate between who was who'' because not all Navy personnel were in uniform.

[9] Baldwin conceded, however, that his back was turned.

[10] But, Baldwin acknowledged, Hartsock did speak ''a little bit louder . . . to make his point.''

[11] Aguiar assertedly brought several grievances on his own behalf. One, in 1985, resulted in his receiving an unspecified amount of backpay because of an improper denial of overtime opportunities. He testified that Dunn remarked, when tendering the award, ''Here, asshole''; and that, later the same day, Dunn said he was ''going to beat [Aguiar] up,'' only to break into a smile and say he ''was joking.'' Dunn denied making either comment.

[12] Sec. 2(3) of the Act states: ''The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . .''

[13] *Eastex v. NLRB*, 437 U.S. 556, 564 (1978); *H. B. Zachry Co*., 289 NLRB 838 (1988); *Yellow Cab*, 210 NLRB 568, 569 (1974); *Washington State Service Employees (Jill Severn)*, 188 NLRB 957, 958–959 (1971).

[14] The two versions being functionally equivalent, the precise formulation of Hartsock's threats need not be resolved. See *Peddie Buildings*, 203 NLRB 265, 266 fn. 4 (1973).

[15] E.g., *Albertsons*, 289 NLRB 177 (1988); *Peddie Buildings*, supra at 203 NLRB 266.

[16] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), quoting from *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956). See also *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 204–207 (1976); *Providence Hospital*, 285

ouster—as shown by his disputing Van Zevern's claim that Aguiar was a union representative and by his exempting known union representatives from like treatment—was that he did not perceive him to have official status. In a real sense, then, he singled out Aguiar because he was a statutory employee engaged in protected activity.

Thus, Hartsock's demands and threats served no legitimate private property interest.[17] I conclude, therefore, that PDD violated Section 8(a)(1) as alleged.[18]

2. The objection

Hartsock's 8(a)(1) conduct occurred during the first half of the polling period, at a place that the employees ''had to go by . . . to go up the stairs to'' vote.[19] Moreover, he spoke with a considerably raised voice and betrayed intense anger.[20] The inference thus is inescapable that employees yet to vote either saw or heard about the episode, particularly because some employees were seen nearby[21] and some indicated by their later comments that they had observed or heard about it.[22]

I conclude that, by so vividly displaying his animus toward a union sympathizer in these circumstances, Hartsock interfered with free voter choice; and that the election therefore should be set aside, and a new election conducted, if, after a tally of all valid ballots,[23] the District Council has less than a majority.

IV. THE CHALLENGED BALLOTS

As mentioned, 12 ballots were challenged. Five were challenged because the voters' names were not on the voters' list, and seven on the ground that the voters were supervisors.

A. *The Five Not on the Voters' List*

1. Evidence

The five not on the voters' list are Elbert Cobb, Alfonso Curiel, Atanasio Duenas, Abel Topete, and Stanley Wilcox. The stipulated pay roll period for voter eligibility was that ending August 7, 1988. None of the five was then on the pay roll. All were on it at the time of the election, however,and had been continuously for several weeks before. All also had been on it at various other times, including before August 7.[24]

Baldwin testified that he, Hartsock, and Dunn ''put together'' the voter list; and that they excluded these five, and a number of others, because they were not on the pay roll on the cutoff date and had not achieved seniority status. He explained that those without seniority had ''no right to recall'' and that, to realize seniority, an employee wag required by company policy to be on the pay roll for 90 days in a 6-month period.

Hartsock testified that PDD's complement in unit classifications ranged roughly between 30 and 100 in 1988, changing daily; that ''about 40'' had seniority; that more of the 1988 employees lacked than had seniority; that, the unions comprising the District Council no longer being a manpower source because of the 1987 strike, PDD ''developed a pool'' from which it since has drawn; and that, once the seniority roster is exhausted, it recalls those from the pool who have ''proved themselves.''

2. Conclusion

The five in question, in essence, are on-call employees. The Board considers on-call employees to be eligible to vote ''if they regularly average four hours of work per week in the quarter preceding the election.''[25] Each of the five far exceeded that. I therefore overrule the challenges to their ballots.

B. *The Alleged Supervisors*

The seven alleged supervisors are Walter Burke, James Hendricks, Thurman Lee, Charles Marino, James Moody, Robert Reading (the Petitioner), and Louis Santiago. Reading challenged Burke's ballot; the District Council challenged the others.

NLRB 320 (1987); *Fairmont Hotel*, 282 NLRB 139, 140–143 (1986); *Peddie Buildings*, supra at 203 NLRB 266–267.

[17] Notably, Aguiar obtained a gate pass before going onto the premises, and Dunn, in two encounters with him before Hartsock entered the picture, in no way challenged his being there. The record contains no evidence that Hartsock cited Aguiar for electioneering, and, even if he had, that would not have worked to vindicate PDD's property interests. I conclude in any event, the only indications to the contrary being Dunn's professed speculations, that Aguiar did not overreach. *Blazes Broiler*, 274 NLRB 1031 (1985); *Milchem, Inc*., 170 NLRB 362 (1968).

[18] *Peddie Buildings*, supra at 203 NLRB 267. Although I do not believe Hartsock and Baldwin that Hartsock stated, during the preelection conference, that only those union officials at the conference could be on the premises during the election, the fact of such a pronouncement would not override Aguiar's Sec. 7 rights. This is not to say that PDD would be obliged to hold ''open-house'' regardless of the number of stranger employees coming into the yard in support of the District Council. That would inject considerations not before me.

[19] Quoting Dunn.

[20] Crediting Van Zevern, Aguiar, and Regan. Their testimony in this regard was much more convincing than that of Hartsock, Dunn, and Baldwin and was more plausible, as well, given the probabilities inherent in the situation. Hartsock and Dunn are not credited that Regan was not in a position to observe. His proximity perhaps did not register with them because of their absorption in the encounter.

[21] Crediting Van Zevern and Regan.

[22] Crediting Van Zevern and Aguiar, who was corroborated by Turner. Turner's testimony that he did not see Hartsock on the day in question (see fn. 6, supra) was not convincing.

[23] Including those determined below to have been challenged in error.

[24] Thus, *Cobb* was on the pay roll from August 13 to December 16, 1987, from October 4 to December 16, 1988, from January 12 to February 9, 1989, and from February 15, 1989, to the time of trial; *Curiel* was on the pay roll on December 15, 1987, from February 2 to an uncertain date (the record entry is illegible) after April 8 and before June 6, 1988, from June 6 to 22, 1988, from September 27 to December 16, 1988, from January 23 to February 9, 1989, and from February 23 to 24, 1989; *Duenas* was on the pay roll from January 21 to February 9, 1987, from February 11 to 19, 1987, from February 24 to 25, 1987, from March 4 to 9, 1987, from February 24 to May 19, 1988, from September 19 to 23, 1988, and from September 27, 1988, to the time of trial; *Topete* was on the pay roll from February 10 to May 19, 1988, from June 4 to 17, 1988, from June 27 to 30, 1988, from September 6 to 23, 1988, from September 27 to December 16, 1988, from January 13 to February 9, 1989, and from February 18, 1989, to the time of the trial; and *Wilcox* was on the pay roll from April 14 to May 3, 1988, from sometime after May 3 to sometime in July before July 23, 1988 (the record entries are illegible), from July 23 to 28, 1988, from August 22 to 25, 1988, from September 7, 1988, to January 13, 1989, and from January 24 to March 21, 1989.

[25] *West Virginia Newspaper*, 265 NLRB 446, 446 (1982).

1. The foremen

a. *Evidence*

Four of the seven alleged supervisors—Hendricks, Marino, Moody, and Santiago—are called foremen.[26] The voter list described Hendricks and Marino simply as painters, Moody as a pipefitter, and Santiago as a shipwright. Hendricks has been on medical leave since July 1988. Hartsock testified that he expects Hendricks to return, but has no idea when. Marino meanwhile has been acting foreman of the paint shop. He will revert to his former leadman's position, according to Hartsock, when Hendricks comes back.

PDD has a foreman for each of its several crafts. They are hourly paid, so historically have been deemed in the bargaining unit; and each works with the tools of his craft to a greater or lesser extent, depending on the size of his crew at a given time.[27] Each receives $1 per hour above journeyman scale, on the other hand, has a desk and attends a weekly ''production meeting'' with Dunn and PDD's three coordinators.

Hartsock testified that the foremen are involved in hiring ''on a limited basis.'' He amplified that they interview applicants ''on occasion''—that is, when Dunn and other higher-ups are not available, and that they independently arrange for help when PDD ''need[s] somebody on short notice''—in ''an emergency or [for] a weekend job.'' Hartsock hastened to add that this latter is ''not the normal routine,'' and generally requires little exercise of judgment inasmuch as the foreman is to seek, in order, current employees not on duty, those on the seniority roster but not on the pay roll, and then those in the nonseniority pool.

With regard to firing, Hartsock testified that, although he makes the ''ultimate decision,'' the foremen sometimes ''have input.'' He particularized that, if an employee's productivity were the problem, he ''would talk to people that had knowledge of that circumstance,'' including the foreman, and that the foreman's recommendation to fire ''would be very persuasive'' if the employee had not previously ''proven'' himself.[28]

Hartsock testified that the foremen assign work to those under them and ''keep track of'' their time, intervene with the personnel department should a mistake occur in a crewmember's pay, enforce PDD- and government-mandated safety standards,[29] and see that equipment is maintained and needed materials and supplies are ordered.[30]

Hartsock testified that the foremen cannot grant time off without clearing with Dunn,[31] that all employee discipline ''goes through'' Dunn, that Dunn and he determine disciplinary sanctions, and that the foremen are not authorized to adjust employee grievances.[32]

The duties and responsibilities of the foremen have changed ''slightly'' in the last couple of years, according to Hartsock, but without any erosion of their authority. Because PDD has not used the hiring halls of the District Council's member unions since the 1987 strike, for example, the foremen do not call in orders as before; and, whereas each foremen had been equally involved in all jobs employing his craft until the summer of 1988, he now focuses on ''the most important jobs,'' leaving oversight of the rest to his leadman ''unless there's a problem.'' Hartsock testified that this change was made because the foremen had been ''spread . . . too thin,'' and was intended to improve their effectiveness on the ''more complicated and more involved jobs.''

Van Zevern testified that Hendricks often called him, asking for the referral of painters, between late 1983 and the strike; that Hendricks asked for people by name the vast majority of the time; that he told Van Zevern ''on a number of occasions'' that he was seeking a replacement for someone he had fired; and that he also said ''on a number of occasions'' that, having once fired this or that person, he did not want the person referred again.

Van Zevern testified, as well, that he dealt with Hendricks on numerous grievances, and that they settled them ''in most cases'' without involving Dunn or Hartsock. Aguiar testified that Hendricks authorized vacation time for those under him before the strike; that the painters ''used to ask him'' and ''then he'd decide.''

Thomas Scott testified that he was a part of a five-man pipefitting crew under Moody for a few days in early 1988; that Moody ''directed'' the crew, but did not himself work with the tools. Scott testified, in addition, that Moody reassigned him from that job, on a Navy tugboat, to one on a Coast Guard cutter; and that Moody also ''set up'' and graded a silver brazing test administered to Scott. Scott worked for PDD only a week and a half in early 1988, and has not observed Moody since.

Rick Anderson, now a business representative for Carpenters Local 2236, testified that Santiago hired him in 1983; that he directed the carpentry work on the *USS Gallant* at that time; that he did not work with the tools on that job; and that he ''was running everything going on'' with regard to shipwrights.

None of the four foremen in question testified.

b. *Conclusion*

To recapitulate, PDD's foremen attend production meetings with higher-ups, effectively recommend discharge in some situations, assign work, independently arrange for additional employees on occasion, sometimes interview job applicants, enforce safety standards, and ''keep track of'' time. They in addition are paid $1 per hour more than the journeymen and have their own desks.

[26] Crediting Hartsock. Harold Vaquez, a PDD warehouseman, testified that Moody and Santiago are ''coordinators,'' also known as ship superintendents. The coordinators are above the foremen and below Dunn in the chain of command, appear to possess supervisory powers, and have never been considered part of the unit. Vaquez' efforts to pin the title on Moody and Santiago, although perhaps sincere, did not come across as authoritatively based.

[27] Crediting Hartsock, who was not meaningfully contradicted on the point.

[28] But, Hartsock testified, a foreman's recommendation to fire a proven employee ''wouldn't be very persuasive'' standing alone.

[29] Hartsock testified that the foremen are authorized to stop a job, ''if necessary,'' to ensure safety.

[30] Orders are subject to approval, however, by Dunn or a coordinator.

[31] Only Dunn being ''aware of the whole, total picture.''

[32] Hartsock nevertheless conceded that foremen might adjust grievances ''at the lowest possible level.''

The four in question thus possess certain of the indicia of supervisory status set forth in Section 2(11) of the Act.[33] I consequently sustain the challenges to their ballots.[34]

2. Walter Burke

a. *Evidence*

Burke was classified as a warehouseman on the voter list. Hartsock testified that Burke bears the title of leadman, is ''in charge of the warehouse,'' and ''generally'' has three or four warehousemen under him. As a leadman, he receives 60 cents per hour above journeyman scale. Burke has his own desk, according to Hartsock, and is responsible for seeing that warehouse equipment is maintained and that safety standards are observed.[35] Hartsock added that Burke works with the tools, which is to say that he drives a forklift and helps crate and uncrate; and that he is considered part of the unit.

Harold Vaquez, a PDD warehouseman, testified that Burke directs the work in the warehouse, expanding:

> Well, if we had a certain shipment of material that had to be shipped out and it was a priority one, he would tell us that that has to be done today. We have to get these particular items out and shipped or something, received or checked, depending on what it is.

Burke did not testify.

b. *Conclusion*

The record affords no substantial basis for inferring that Burke's duties are anything but routine, that his direction of others entails any significant measure of independent judgment, or that he otherwise satisfies any of the supervisory criteria.[36]

I therefore overrule the challenge to his ballot.

3. Thurman Lee

a. *Evidence*

Lee was termed a dockman on the voter list. Hartsock testified that Lee is ''the one that operates the drydock and sets the blocks,'' that he is ''responsible for seeing that that's done properly,'' and that this entails coordinating several crafts. This occupies about 20 percent of Lee's time, according to Hartsock,[37] the remainder being devoted to general maintenance work and ''special projects'' of Dunn's choosing, such as remodeling the lunchroom. Hartsock testified that Lee works with the tools and has his own desk.

Vaquez testified that Lee orders supplies and materials from him; and Rick Anderson, that he dispatched several employees from his union's hiring hall in 1985 on Lee's request.

Lee did not testify.

b. *Conclusion*

Although the record concerning Lee is not well developed, I find it difficult to imagine how he can discharge his responsibilities—especially those related to the building of drydocks—without exercising considerable amounts of independent discretion while directing the work of others.

I conclude, therefore, that Lee is a supervisor; and sustain the challenge to his ballot.

4. Robert Reading

a. *Evidence*

Reading was classified as a crane operator on the voter list. He credibly testified that he operates a crane ''about 65 percent of the time,'' spending the balance doing ''a variety of things''—such as helping various other crafts and doing paperwork in connection with jobs for the Navy.

Reading further testified, without controversion, that he does not hire, fire, or discipline others, and that no one is under him.

b. *Conclusion*

The record does not remotely suggest that Reading is a supervisor. I therefore overrule the challenge to his ballot.

CONCLUSION OF LAW IN CASE 32–CA–10161

PPD violated Section 8(a)(1) of the Act on December 1, 1988, when its general manager, Robert Hartsock, threatened a statutory employee, Everardo Aguiar, that he would call the police or cause him to be arrested, because he was engaging in activity protected by Section 7 of the Act.

Report in Case 32–RD–877

A. *The Objection*

By the same unlawful conduct, PDD interfered with free voter choice in the election held December 1, 1988. That election therefore should be set aside and a new election conducted if, after a tally of all valid ballots, the District Council has less than a majority.

B. *The Challenged Ballots*

The challenges to the ballots of the following voters are overruled: Elbert Cobb, Alfonso Curiel, Atanasio Duenas, Abel Topete, Stanley Wilcox, Walter Burke, and Robert Reading. Their ballots should be counted.

The challenges to the ballots of the following voters are sustained: James Hendricks, Charles Marino, James Moody, Louis Santiago, and Thurman Lee. Their ballots should not be counted.

[Recommended Order omitted from publication.]

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[33] E.g., *Rose Metal Products*, 289 NLRB 1153 (1988). Sec. 2(11) states:

The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[34] Given that Marino had been acting in Hendricks' stead for several months before the election and that the timing of Hendricks' return is uncertain, Marino must be deemed the equal of the other foremen.

[35] Hartsock explained, ''He was the supervisor, so it's overall his responsibility.''

[36] E.g., *Howland Hook Marine Terminal*, 263 NLRB 453, 455 (1982); *Teamsters Local 626 (Quality Meat)*, 224 NLRB 186, 186–187 (1976); *Adam & Eve Cosmetics*, 218 NLRB 1317, 1317 (1975).

[37] Hartsock enlarged that PDD builds about 10 drydocks a month, and that the time required for each ranges from 2 hours to a day and a half.